Before Mr. Justice Ghose and Mr. Justice Porter.

1886
June 18.

WAJIBUN AND OTHERS (DEFENDANTS) *v.* KADIR BUKSH (PLAINTIFF).*

Limitation Act (XV of 1877), s. 19—Acknowledgment of debt—Secondary Evidence of Acknowledgment—Authority to bind Minor by acknowledgment.

An original account book containing an acknowledgment of a debt had been filed in Court, and subsequently lost whilst in Court; *held*, that secondary evidence of such acknowledgment might be given, notwithstanding the words of s. 19 of the Limitation Act.

A person merely by reason of being the mother and guardian of a minor has no authority to make an acknowledgment of a debt on behalf of the minor, so as to give a creditor a fresh start for the period of limitation.

THE plaintiff brought this suit on the 4th May 1883 against the heirs of one Syed Abu Syed to recover a sum of Rs. 929-5 on account of goods sold to Syed Abu Syed during his lifetime between the years 1872 and 1879.

He alleged that shortly after the death of Syed Abu Syed, *viz.*, on 1st August 1880, it was agreed amongst the said heirs that 11 annas of the debt was to be paid by the defendant Fusibun (the elder widow) and her children defendants Nos. 1 to 8, and 5 annas by the defendant Wajibun, the younger widow, and her children defendants Nos. 9 to 14, and that on that day accounts were settled and signed by the *ammukhtars* of the widows; and that the book which bore these signatures had been filed in a suit in the Small Cause Court and was not forthcoming.

The elder widow did not appear, and her children through their guardian admitted the plaintiff's claim; the younger widow appeared, and contended that, as the account closed in April 1879, the suit was barred; she admitted the settlement, but denied the *ammukhtar's* power to sign the account for her and her children.

The Munsiff allowed the plaintiff to give secondary evidence of the acknowledgment in the account book, and found that the acknowledgment had been made on the widow's behalf with

* Appeal from Appellate Decree No. 1577 of 1885, against the decree of Baboo Mothura Nath Gupto, Roy Bahadur, Subordinate Judge of Patna, dated the 24th of April 1885, affirming the decree of Moulvi Abdul Bari, Khan Bahadur, B. L., Munsiff of that district, dated the 27th of June 1884.

their authority; he therefore gave the plaintiff a decree against all the defendants, making the estate of the deceased in the respective defendants' hands liable for the debt.

The defendant Wajibun and her children through her appealed to the Subordinate Judge.

The Subordinate Judge found that the accounts had been settled on the 1st August 1880; that they had been duly signed by the widow's *ammukhtars*, and that the Munsiff had rightly allowed secondary evidence of the acknowledgment, the book having been proved to have been lost; he therefore upheld the Munsiff's decree.

The same defendants appealed to the High Court.

Mr. *Abdool Hossein* and Munshi *Serajul Islam* for the appellants contended that the suit was barred; that under s. 19 of the Limitation Act oral evidence of the contents of the so-called acknowledgment should not have been admitted; that the Judge was wrong in giving a decree against the minors, as they could not be bound by the acts of the *ammukhtars*.

Munshi *Mahomed Yusuf* for the respondents contended that the acknowledgment implied a fresh promise, and that limitation would run from that period; that the plaintiff was entitled to recover the whole of the debt from the widow Wajibun who had made herself liable for the whole of the debt by acknowledging it; that under the Mahomedan law the plaintiff might recover the whole of the debt from Wajibun as representative of the deceased.

The judgment of the Court (GHOSE and PORTER, JJ.) was as follows:—

This was a suit to recover from the heirs, other than the mother of one Syed Mahomed Abu Syed, the price of clothes and other articles sold to him by the plaintiff from 1279 F. S. to Bysakh 1286 F. S. The said heirs are: *first*, Mussamut Fusibun, the first widow of Mahomed Abu Syed, the defendant No. 1, and the defendants Nos. 2 to 8, the children of Abu Syed by Fusibun; and *second*, Mussamut Bibi Wajibun, his second widow, the defendant No. 9, and the defendants Nos. 10 to 14, his minor children by Wajibun—the said minors being represented by their mother and natural guardian Wajibun.

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This suit was brought on the 14th of May 1883, that is to say, three years after the transactions of sale; but it was alleged and proved in the opinion of both the lower Courts, that on the 1st of August 1880, the accounts were settled between the plaintiff on the one hand and Mussamut Fusibun and Mussamut Wajibun on the other, and that Rs. 2,555-2 having been found to be due to the plaintiff from the estate of Abu Syed, the sum Rs. 2,129-5-8 was determined as payable by the two sets of defendants, in the proportion of Rs. 1,612-10-10, and Rs. 566-10-10, respectively. This settlement was acknowledged in writing by the two ladies on the accounts, their respective agents authorized in that behalf signing for them.

The plaintiff thereupon contended that the suit having been brought within three years from the said acknowledgment, it was within time.

We ought here to mention that the suit was for the recovery of Rs. 929-5, after giving credit to the defendants for the sums paid by them, and the decree that was awarded by the Courts below was for Rs. 462-10-6, as recoverable from the estate of Abu Syed, in the hands of defendants Nos. 1 to 8, and the sum of Rs. 466-10-6, from that portion of the said estate which was in the hands of defendants Nos. 9 to 14.

The present appeal is by Mussamut Wajibun and her children against that portion of the decree that was awarded against them, and the main contentions that were raised on their behalf before us were: (1) that the acknowledgment signed by the defendants being not forthcoming, no oral evidence should have been received under s. 19 of the Limitation Act, to prove the contents of the said acknowledgment; (2) that the acknowledgment did not bind the minors, and, therefore, so far as they were concerned, no decree ought to have been given against them.

As regards the first contention it appears to us that, although s. 19 of the Limitation Act provides that "when the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed, but no oral evidence of the contents shall be received," still this was not meant to exclude *secondary*-evidence of the contents of the acknowledgment, under s. 65 of the Evidence Act, when a proper case for

the reception of such evidence is made out, and in this respect we agree in the views so fully expressed in a recent decision by a Divisional Bench of this Court in the case of *Sambhu Nath Nath* (1). In the present case, it has been found that the original account book containing the acknowledgment was filed by the plaintiff in a previous suit between the parties, but has since been lost, and, therefore, it seems to us that it was open to the plaintiff to give secondary evidence of the contents of the said acknowledgment.

As regards the second contention, we are of opinion that the acknowledgment by an agent, authorized in that behalf by Mussamut Wajibun, would not necessarily bind the minors. The mother, in the absence of any special authority being proved to exist in her, cannot be regarded as an agent on the part of the minors duly authorized in that behalf within the meaning of s. 19 of the Limitation Law, and it appears to us that a person, merely by reason of her being the mother and natural guardian, has no authority to make an acknowledgment on behalf of minors so as to give a creditor a fresh start for the period of limitation.

We therefore think that the claim, so far as the minors are concerned, is barred by limitation, it having been brought beyond three years from the original transactions.

It is, however, contended by the learned vakeel for the respondent that the acknowledgment implies a fresh promise, and that, therefore, irrespective of s. 19 of the Limitation Act, the debt is not barred against the minors. But it is quite clear that there was no consideration so far as the minors were concerned, for this fresh promise on the part of the mother, and therefore the said promise by her could not be regarded as an act in the interest of the minors, such as would be binding upon them. Another point was raised by the vakeel for the respondent to the effect that, supposing that the claim could not be maintained against the minors, Mussamut Bibi Wajibun, by reason of her acknowledgment, made herself liable to make good the whole amount, and that therefore the claim ought to be decreed in its entirety against her. But it is obvious that

(1) I. L. R., 12 Calc., 267.

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it was never intended that the said Mussamut should make herself solely responsible for the whole debt; it was never the plaintiff's case that she made herself so liable, nor do we think it would be equitable in the circumstances of this case to make her liable for the whole debt. It was further argued that under the Mahomedan law, it was competent to the plaintiff to realize the whole of his dues from the said Mussamut, she being in possession of the whole estate in a representative capacity. But the answer to this is that, in the first place, it was never the plaintiff's case that the lady was in possession of the whole estate, nor that she was in such possession in a representative capacity. On the contrary, the plaintiff's case is, that upon Abu Syed's death, there was a distribution of the estate among his heirs, and that both the widows and the children were in possession of their respective shares.

We are, therefore, of opinion that in the circumstances of the present case, the plaintiff is not entitled to recover more than a proportionate share of the debt from Mussamut Wajibun, namely, a share proportionate to the assets received by her in the estate of Abu Syed.

The result is that the suit, so far as the minors are concerned, will be dismissed; and that a decree will be passed against Wajibun for Rs. 58-5-3.

This order does not in any way interfere with the decree already passed in plaintiff's favour against the defendants Nos. 1 to 8.

As regards the costs, we are of opinion that Bibi Wajibun, in the circumstances of this case, should pay the plaintiff's costs in this Court and in the lower Courts. We allow no costs to the minors.

T. A. P. *Decree varied.*